U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 07 April 2004

BALCA Case No.: 2003-INA-100
ETA Case No.: P2000-CA-09515071

In the Matter of:

CHILITOS,
Employer,

on behalf of

ANTONIO CORTES-CARLOS,
Alien.

Appearances: Norma Negrete, Immigration Consultant
Santa Barbara, California
For Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Antonio Corets-Carlos ("the Alien") filed by Chilitos ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act") and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained

in the Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On February 22, 2001, Employer filed an application for labor certification on behalf of the Alien for the position of Foreign Food Specialty Cook. (AF 24-25). The position required two years experience.

On October 17, 2002, the CO issued a Notice of Findings ("NOF") indicating intent to deny the application on the ground that the two years experience requirement was excessive for the successful performance of the position and consequently the job experience requirement was unduly restrictive, in violation of 20 C.F.R. § 656.21(b)(2)(i)(A). (AF 20-22). The CO indicated that Employer had two options: to amend the restrictive requirement or to justify the requirement as business necessity. Alternatively, Employer was instructed to document that the requirement is the usual requirement for the industry. (AF 21).

In its Rebuttal dated November 15, 2002, Employer noted that the meals at Employer's restaurant were prepared and cooked from scratch and in addition to the items in the menu, Employer offered daily specials. (AF 12-19). Employer asserted that the preparation of the meals offered in the restaurant required the expertise of qualified cooks with at least two years of experience. (AF 12). In support of its argument, Employer submitted a copy of its menu, photos showing the daily specials and Employer's business. (AF 13-19).

On December 2, 2002, the CO issued a Final Determination ("FD") denying certification. (AF 10-11). The CO noted that the pictures submitted by Employer showed that Employer was one of several counter-service outlets at a food court. Additionally, the daily specials were limited to five items a day. Consequently, the CO

found that Employer failed to prove that the position required a cook with two years experience. (AF 11).

On January 8, 2003, Employer filed its Request for Review reasserting that the meals at the restaurant were cooked from scratch and that it was a full service Mexican restaurant. (AF 1-9). Employer noted that the preparation of the meals involved several steps, which required the expertise of a qualified cook with two years of experience. (AF 1-2). Employer also noted that the list of daily specials submitted with the Rebuttal was limited to the specials of the month. Because that list of specials was incomplete, Employer submitted another list that included all the specials offered. (AF 3-7). Employer also argued that although the restaurant was located in a food court, it was not a fast food outlet. Employer also asserted that it had succeeded in three labor certifications with identical requirements for the same position and submitted the case numbers. (AF 1-9).

The record does not reflect that Employer filed a brief.

DISCUSSION

Twenty C.F.R § 656.21(b)(2) prohibits the use of unduly restrictive requirements. Unduly restrictive requirements have a chilling effect on the number of U.S. workers who may apply or qualify for the job opportunity. Further, the purpose of 20 C.F.R. § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 1987-INA-569 (Jan. 13, 1989) (*en banc*).

When an employer cannot document that a job requirement is normal for the occupation, 20 C.F.R. §656.21(b)(2) mandates that the employer establish business necessity for the requirement. To demonstrate business necessity, the employer must establish that (1) the restrictive requirement bears a reasonable relationship to the occupation in the context of its business and (2) the skill level described in the restrictive requirement is essential to performing in a reasonable manner the job duties described in

its application for alien labor certification. *Information Industries*, 1988-INA-82 (Feb. 9, 1989) (*en banc*).

In the instant case, Employer required two years of experience as a foreign specialty cook, arguing that its business is a full service restaurant. The CO, on the other hand, determined that the appropriate requirement for the position was between three months and one year of experience as a cook. The CO noted that the restaurant was a fast food establishment.

Employer submitted a copy of its menu, establishing that the items it served consisted of Mexican dishes of a limited level of complexity that would not require two years of experience to master. Other than an assertion that the preparation of these foods required a skilled cook, Employer has not demonstrated how the requirement of two years experience was based on business necessity. Because the items in the menu would not require the level of experience of a Cook with two years of experience, Employer did not show that this restrictive requirement is essential to perform in a reasonable manner the job duties described in its application for labor certification.

In *Why Not, Inc.*, 1994-INA-603 (Aug. 31, 1995), Employer did not show the need for a cook with two years experience in Middle Eastern cooking in a shop that was a deli/carry out business. Employer's establishment in the instant case is in essence a fast food restaurant and not a full service restaurant. Therefore, Employer has not shown that the requirement of two years experience had any reasonable relationship to the occupation in the context of Employer's business. Failure to establish business necessity for an unduly restrictive job requirement will result in the denial of labor certification. *Robert Paige & Associates, Inc.*, 1991-INA-72 (Feb. 3, 1993); *Shaolin Buddhist Meditation Center*, 1990-INA-395 (June 30, 1992).

Because Employer did not prove business necessity and the AF does not describe a full service restaurant that would require the services of a cook with two years experience, we agree with CO's finding that the primary work of the cook in this restaurant is more consistent with the job duties of a Fast Food Cook with up to one year of experience. Employer has not demonstrated that the position is that of a Foreign Food Specialty Cook with two years of experience. Consequently, for the above stated reasons we affirm the CO's denial and accordingly the following order will enter[1]:

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity

[1] Employer in its Request for Review submitted a complete list of daily specials offered in its restaurant in addition to a copy of comments about the restaurant in a web site. However, this evidence could not be considered by this Panel because our review must be based on the record upon which the CO reached a decision. Evidence first submitted with the Request for Review cannot be weighed. *Memorial Granite*, 1994-INA-66 (Dec. 23, 1994); *Cappricio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Additionally, we note that Employer made reference to three successful labor certifications for the same Employer and with identical requirements. These assertions were made to support Employer's request for a reversal of the CO's denial. However, each application for labor certification must stand on its own merits. Thus, the findings of a CO in one case is not binding upon the CO in the determination on future cases and furthermore, the Board is not bound by the decision a CO may have made in a different case. *Tedmar's Oak Factory*, 1989-INA-62 (Feb. 26, 1990); *Paralegal Priorities*, 1994-INA-117 (Feb. 1, 1995).

of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.